Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1998

Daniel Sanders
Petitioner

v.

William Blatnick
Respondent

On Petition For Writ of Certiorari
to the United States Court of Appeals for the
Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Mark Robert Moore
Counsel of Record
225 Stevens Ave. #104
Solana Beach, Ca 2075
(619) 259-7400-telephone

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QUESTIONS PRESENTED

1. Can a Bankruptcy Court annul the automatic stay provisions of 11 USC 362(a)retroactively so as to validate a statutorily void foreclosure sale ?

2. Does a Court of Appeal that dismisses an appeal for mootness based on the sale of real property to a third party after an appeal has been fully briefed without deciding if the sale was valid deprive an appellant of their due process rights?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption additional parties to the proceeding in the court below were, Darlyne Blatnick as an additional trustee of the Blatnick Family Trust, Terry Blatnick and Lisa Mendenhall.

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Appendix A-Published Opinion if the United States Bankruptcy Court for the Southern District of California Filed June 28, 1996.....1a

Appendix B Unpublished Opinion of the United States Bankruptcy Panel for the Ninth Circuit filed November 28, 1997.....9a

Appendix C-Unpublished Opinion of the United States Court of Appeals of the Ninth Circuit filed August 24, 1998.....14a

Petitioner Daniel Sanders respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The original decision of the United States Bankruptcy Court for the Southern District of California was published as Blatnick v. Sanders (In Re Sanders) 198 B.R. 326. (1996) and is reproduced in the appendix to the petition (Appendix A). The decision of the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals in In Re: Daniel Sanders SC-96-1676 RyRO (9th Cir.BAP November 28, 1997) is an unpublished opinion and is reproduced in the appendix to the petition (Appendix B). The decision of the Ninth Circuit Court of Appeals in In Re: Daniel Sanders (9th Cir 98-55124 August 24, 1998) is an unpublished opinion and is reproduced in the appendix to the petition (Appendix C).

Statement of Jurisdiction

1. Jurisdiction in the Bankruptcy Court Jurisdiction was conferred on the United States Bankruptcy Court for the Southern District of California under 28 USC 158 (b) (1). The decision was filed June 28, 1996. (Appendix A Page 1a). The appeal to the Bankruptcy Appellate Panel was filed July 11, 1996.

2. Jurisdiction in the Bankruptcy Appellate Panel of the Ninth Circuit The jurisdiction of the Bankruptcy Appellate Panel flowed from In Re: Kelly 12 F.3d 255 (9th Cir. BAP 1995). The Decision of the Bankruptcy Appellate Panel was filed November 28, 1997. (Appendix B Page 11a).

3. Jurisdiction in the United States Court of Appeal for the Ninth Circuit The Bankruptcy Appellate Panel entered its Memorandum Decision dismissing the appeal on November 28, 1997. Petitioner timely filed his appeal to the Ninth Circuit on December 29, 1997. The Decision of the Ninth Circuit affirming that order of dismissal was entered August 24, 1998. (Appendix C p.14a)

4. Jurisdiction in this Court Rule 13 of the Rules of the United States Supreme Court provide that a Petition for as Writ of Certiorari to review a decision of a Federal Appeals Court shall be filed within 90 days after entry of Judgment.

APPLICABLE STATUTES

The applicable statute in this matter is 11 USC 362. The applicable portions of the statute are as follows:

> (a) Except as provided in subsection (b) of this section, a petition files under section 301, 302 or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities of--
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;...
>
> (4) any act to create, perfect, or enforce any lien against property of the estate....
>
> (d) On request a party in interest and after notice and a hearing shall grant relief from the stay provided

under subsection (a) such as by terminating, annulling, modifying or conditioning such stay-

(1) For cause, including the lack of adequate protection of an interest in such party in interest.

STATEMENT OF THE CASE

The questions presented by this petition are twofold:

1. Can a Bankruptcy Court annul the automatic stay provisions of 11 U.S.C. Section 362(a) to validate a foreclosure on real property which is statutorily void?

2. Can a Court of Appeal (in this case the Bankruptcy Appellate Panel) dismiss an appeal due to the transfer of the property to a third party without first deciding if the annulment by the lower court could validate the foreclosure sale

In deciding these issues, this court can resolve a split of opinion in the Ninth Circuit on question one which has been posed by the circuit in In re Shamblin, 898 F.2d 123 (9th Cir. 1989) at 126 fn. 3.

A. Facts Material to the Consideration of the Questions Presented

The underlying facts of the case are taken from the original opinion of the Bankruptcy Court filed in June 1996 and published as Blatnick v. Sanders, supra. (Appendix A)

Daniel Sanders (Petitioner) filed a proceeding under 11 USC 1100 et. seq. on February 16, 1996 at 9:06 a.m. in the United States Bankruptcy Court for the Southern District of California. At 1:00 p.m. that same day, Blatnick et. al.

(Respondent) conducted a non-judicial forclosure sale of Sander's real property under the provisions of California Civil Code Section 2924h.

B. The Proceedings Below

Thereafter Blatnick brought a motion for relief from the automatic stay provisions of 11 USC 362 based on a provision of the California law that provided that the time of day of a foreclosure sale was deemed to be at 8 a.m. .the morning of the day it was conducted.(Appendix "A" at p. 2a) Blatnick also alleged that the Debtor's filing of the Chapter 11 case was in bad faith because, among other things, he had failed to call Blatnick's foreclosure service to tell them he had filed. The court, in its order, found that Blatnick's foreclosure sale was void as a violation of the automatic stay (Appendix A p.6a) stating "The Court holds that the foreclosure sale conducted post-petition is void". However, the Court then annulled the automatic stay on the basis of Sanders' alleged bad faith filing of the Chapter 11 case "as to Movants [Blatnick]. ..for purposes of perfecting title in the subject property and take all steps permitted by applicable state law to reduce the subject property to their possession." (Appendix A Page 7a-8a). The Bankruptcy Court did not specifically validate Blatnick's void post-petition foreclosure sale. Blatnick took no other action with reference to the property except to allegedly sell to a third party it as discussed below.

After the case was submitted to the Bankruptcy Appellate Panel for the Ninth Circuit, Blatnick filed a motion to dismiss the appeal on October 27, 1997 (Appendix "B" p. 10a) on the grounds that he had sold the property to a third party. Petitioner responded by arguing that the original foreclosure sale was void. The Bankruptcy Appellate Panel did not rule on this argument but rather simply stated that, because there was no allegation of a bad faith transfer the appeal was moot (Appendix "B" 12a-13a).

The Ninth Circuit upheld the reasoning. (Appendix C Page 15a).

This Petition follows

REASONS FOR GRANTING THE PETITION

A. THE FORECLOSURE SALE WAS DECLARED TO BE VOID AND WAS NOT AND COULD NOT BE VALIDATED BY THE BANKRUPTCY COURT

This petition requests that this court allow the writ to determine if a Bankruptcy Court can annul the automatic stay retroactively to validate a void act. In this case, if Blatnick's foreclosure sale was void as a violation of 11 USC 362, as the lower court declared it to be, the result is, and must be simply that the real property remained in the name and possession of Sanders as property of his Chapter 11 estate until such time as Blatnick performed some further act to perfect his interest in Sanders' real property. The court's order recites merely that the automatic stay is annulled but gives no time or date for the effective date of the annulment. It gives Blatnick permission to "perfect title in the subject property" (Appendix A p. 8a) This Blatnick did not do. Having failed to do so, he had no power to transfer debtor's real property it to any third party. Sanders had no need to obtain a stay pending appeal of the order of the Bankruptcy Court as long as Blatnick made no further efforts to foreclose on his property. No Ninth Circuit decision has held that a Bankruptcy Court has the power to retroactively annul the automatic stay provisions of 11 USC 362. In fact, there exists a split of opinion within the Ninth Circuit on this precise issue. See In Re Shamblin 890 F.2d 123 (9th Cir. 1989) at 126 fn. 3 contrasting In Re Mellor 734 F.2d 1396 (9th Cir. 1984) with Algeran, Inc. v. Advance Ross Corp. 759 F2d 1421 (9th Cir. 1985). This court should

issue it's writ to the Ninth Circuit Court of Appeals to reverse it's order affirming the decision of the Ninth Circuit.

B. THE BANKRUPTCY APPELLATE PANEL IMPROPERLY DISMISSED SANDERS APPEAL

The Bankruptcy Appellate Panel and the Ninth Circuit relied on Onouli-Kona Land Co. v. Estate of Richards (In Re Onouli-Kona Land Co.) 846 F.2d. 1170 (9th Cir. 1988) in holding that Petitioner Sanders should have sought a stay pending appeal which would have theoretically prevented Blatnick from selling Sanders allegedly foreclosed on property pending the decision of the Appellate Panel. But Onouli-Kona relied upon the decision in Algeran, supra., which, again in turn, was relied upon by the BAP (Appendix B Page 12a) without discussing the contradiction pointed out by Shamblin, supra.

Finally, both appellate courts chide Petitioner for not making an allegation that the sale of his property by Blatnick to a third party was in bad faith (Appendix B p. 13a and Appendix C p.15a). However both courts neglect to observe that in order to make such an allegation Sanders would have to concede that that the foreclosure sale declared by the bankruptcy court to be void was, in fact, valid. The failure of both appellate courts to address this issue in the first instance insured that Sanders would be deprived of his right to due process of law which, in this case, should have meant a determination of the issue of the invalidity of the foreclosure sale at the appellate level and a remand to the trial court for a full evidentiary hearing on the issue of bad faith.

CONCLUSION

Petitioner respectfully suggests that this court issue its writ to the Ninth Circuit to reverse it affirmation of the dismissal of Petitioner's appeal.

Respectfully submitted,

Mark Robert. Moore
Counsel of Record
225 Stevens Ave. #104
Solana Beach, California 92075
(619) 259-7400
Attorney for Petitioner